



In the Matter of:

JEROME REID,

ARB CASE NO. 03-039

COMPLAINANT,

ALJ CASE NO. 2002-ERA-3

v.

DATE: December 16, 2003

NIAGARA MOHAWK POWER CORPORATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Jerome Reid, pro se, Syracuse, New York

For the Respondent:

Robert A. LaBerge, Esq., Bond, Schoeneck & King, LLP, Syracuse, New York

FINAL DECISION AND ORDER

BACKGROUND

Jerome Reid filed a complaint pursuant to the Energy Reorganization Act (ERA), 42 U.S.C.A § 5851 (West 1995), alleging that his employer Niagara Mohawk Power Corporation had unlawfully retaliated against him in violation of the ERA's whistleblower protection provisions. Pursuant to 29 C.F.R. § 24.5(d) (2003), a Department of Labor Administrative Law Judge (ALJ) was assigned to hear the case.

On December 26, 2002, the ALJ issued a Recommended Decision and Order of Dismissal for Failure to Comply with Lawful Orders (R. D. & O.). The ALJ found that, "Complainant's complete disregard for and failure to comply with three separate Orders including his failure to attend his scheduled deposition without good cause, constitutes a proper basis for dismissal of the complaint." R. D. & O. at 3.

Reid filed a Petition for Review with the Board pursuant to 29 C.F.R. § 24.8(a). In response to the Petition for Review, on January 15, 2003, the Administrative Review

Board issued a Notice of Appeal and Order Establishing Briefing Schedule. In the Order, the Board informed Reid that his opening brief was due on or before February 14, 2003.

On February 13, 2003, Reid requested an enlargement of time of thirty days to submit his opening brief. The Board granted this request and ordered Reid to submit his brief on or before March 17, 2003.

On March 16, 2003, Reid requested a second enlargement of time to submit his opening brief. The Board granted this request and ordered Reid to submit his brief on or before April 16, 2003. At that time the Board reminded Reid, “this is [your] second request for an extension of time. Continual requests for extensions of time are looked upon unfavorably and may result in case dismissal.”¹ [Second] Order Granting Extension of Time and Amending Briefing Schedule.

Reid did not file his brief by April 16, 2003, as ordered and instead filed a third request for an enlargement of time. The Board granted this request and ordered Reid to submit his brief on or before May 21, 2003. The Board cautioned Reid, “The Complainant is advised that no additional extensions of time will be granted, absent a showing of exceptional circumstances, and failure to timely file briefs may result in the dismissal of [your] case.” [Third] Order Granting Extension of Time and Amending Briefing Schedule.

On May 21, 2003, the Board received a letter from Reid stating, “I Jerome Reid request additional time to submit my initial Brief to the ARB. I will submit [my] brief with in the next 30 days.”

Because Reid failed to demonstrate exceptional circumstances supporting a further enlargement of the briefing schedule after the Board cautioned Reid regarding the consequences of such failure, the Board ordered Reid to show cause no later than June 3, 2003, why the Board should not dismiss his complaint for failure to comply with the Board’s briefing order. The Board permitted Niagara to file a reply to Reid’s response.

On June 3, 2003, via facsimile, Reid responded to the Order to Show Cause stating:

I did in fact retained [sic] attorney Andrew T. Brown of Brown and Hutchinson. It was my understanding that he would represent me in all of my employment complaints. He later made it known unto me that he will not represent me in my Whistle Blower complaints.

¹ The Board had previously dismissed *Reid v. Niagara Mohawk Power Corp.*, ARB No. 01-083 (Dec. 10, 2001), in which Jerome Reid was the complainant, for failure to prosecute.

On June 13, 2003, Niagara replied to Reid's response stating that Reid's complaint should be dismissed. Niagara complained that Reid had failed to serve Niagara with his response to the Show Cause Order simultaneously with Reid's service of the document with the Board. Niagara also argued that Reid had ignored the Board's instruction to demonstrate exceptional circumstances by not including a recitation of such circumstances in his May 21st motion. Niagara also averred that Reid did not show good cause for not filing a timely brief because his failure to communicate with his attorney and to ascertain whether the attorney would represent him in this matter did not constitute exceptional circumstances precluding him from filing his brief as ordered.²

Although Reid stated in his May 21st motion that he would file a brief within thirty days, as of the date of this Order, he has not filed a brief with the Board.

ISSUES

(1) Whether Reid has demonstrated exceptional circumstances in support of his fourth request for an enlargement of time to file his opening brief.

(2) If not, whether the Board should dismiss Reid's appeal because he has failed to prosecute his case.

DISCUSSION

Although offered ample opportunities to do so, Reid has failed to file an opening brief in support of his petition for review. Reid was clearly informed in the Board's order granting a third enlargement of time that no further enlargements would be granted unless he established that there were exceptional circumstances that would support granting an additional enlargement of time. However, Reid's request for a fourth enlargement of time included no such explanation. While the Board does not hold pro se parties to the same standards of professional expertise as those represented by counsel, even pro se parties have an obligation to take the orders of the Board seriously and to comply with them. *Tucker v. Connecticut Winpump Co.*, ARB No. 02-005, ALJ No. 2001-STA-53, slip op. at 5 (Mar. 15, 2002). Furthermore, Reid was well aware of the consequences of the failure to demonstrate exceptional circumstances. In a previous case, the Board denied Reid's fourth extension of time and dismissed his appeal when he failed to demonstrate exceptional circumstances for his failure to timely file his opening brief. *Reid v. Niagara Mohawk Power Corp.*, ARB No. 01-083, ALJ No. 2001-ERA-26 (Dec. 10, 2001).

In response to the Order to Show Cause, Reid averred that he was under the mistaken impression that an attorney had agreed to handle his case. Reid knew that he was unlikely to receive any further enlargements of time, yet he apparently made no

² Niagara notes that the law firm of Brown & Hutchinson began representing Reid with respect to his New York State Division of Human Rights complaint prior to a March 14, 2003 conference held in this matter.

effort to communicate with the attorney to discuss his case or to confirm that a brief would be filed. Accordingly, we find that Reid has failed to demonstrate exceptional circumstances in support of his fourth request for an enlargement of time.

As the Board held in the prior case dismissing an appeal by Reid for failure to prosecute,

[T]he Board has the inherent power to dismiss a case if a petitioning party fails to submit an opening brief as provided in the Board's briefing order. *Solnicka v. Washington Public Power Supply System*, ARB No. 00-009, ALJ No. 99-ERA-19, slip op. at 3 (ARB Apr. 25, 2000). *Accord Link v. Wabash Railroad Co.*, 370 U.S. 626, 630 (1962)(recognizing that courts have the inherent power to dismiss a case for failure to prosecute). Like the courts, this Board must necessarily manage its docket in an effort to 'achieve the orderly and expeditious disposition of cases.' *Id.* at 631.

Reid v. Niagara Mohawk Power Corp., ARB No. 01-083, slip op. at 2. Thus, given Reid's failure to submit an opening brief as ordered, we find that Reid has failed to prosecute his case. Accordingly, we **DISMISS** Reid's appeal.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge